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contract against a married woman incapacitated by the *lex loci contractus* but having capacity by the *lex domicilli* and the *lex solutionis*. It was in an exactly parallel situation in England that the English courts in desperation gave up any attempt at reconciling the conflicting authorities and adopted the intention of the parties' rule. It may be possible that the New York confusion will be similarly solved.

That such a solution will probably be the ultimate result in the United States is rather forcefully illustrated in the most recent judicial expression on the subject.¹⁸ In this case the court was called upon to determine the liability on a note made in Tennessee by a married woman domiciled there and lacking capacity, and payable in Virginia where she had capacity to make the note. After a careful examination of nearly all the American authorities and a close argument on principle, the court upheld the validity of the note, adopting the rule that the law contemplated by the parties was the proper law to determine all questions relative to the contract, other than formalities, and that in the absence of express indication of the parties' intention, the law will presume that the law of the place of performance was intended. This conclusion, it should be noted, is somewhat different from the present English understanding of the intention test, namely that one should attempt to find the place with which the contract has the most real connection and then presume that the law of this place was the law contemplated by the parties.⁴ It may be expected that under different facts this same court would weaken this presumption and probably adopt the "most real connection test." In *Poole v. Perkins*¹⁸ the law of the place of performance sustained the contract and this fact was probably an important factor in causing the court to state its conclusion in the way it did. While in general the cases do not recognize this factor as important, it may be observed by studying a series of cases in any one jurisdiction that it is in fact always an element of highest importance.¹⁹

G. B.

RIGHT OF A SURETY TO AVOID CONTRACT BECAUSE OF DURESS ON THE PRINCIPAL.—The right of a surety to avoid his contract because of duress practiced on the principal is a much debated question. The cases and the authorities are in decided conflict upon this point. Although the conflict is well established, there is much as yet unsaid which may help toward arriving at a more satisfactory understanding of the problem.

When a surety pleads that his principal entered into the main obligation under duress, a simple legal problem arises: is that a sufficient plea for the surety? The answer has been given both

¹⁸*Poole v. Perkins*, 101 S. E. 240 (Va. 1919).

¹⁹*Bell v. Packard*, 69 Me. 105 (1879); *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889); *South African Breweries Co. v. King*, *supra*.

ways, with a variety of opinions between the extreme views. In the early case of *Huscombe v. Standing*¹ the court had little difficulty in deciding that duress on the principal was no defense for the surety. Later cases decided that the surety could avoid an obligation which his principal had entered into under duress, on the ground that if he were compelled to pay, either he would have no recourse against the principal, or the principal would have to pay indirectly what he could not be forced to pay directly. Either alternative would be equally unjust.² But some cases make this right of the surety to escape his contract depend on the question of knowledge. If the surety had knowledge of the duress of his principal when he became bound as surety, he is said to have waived all right to defend on the ground of duress.³ Still other cases consider the relationship of the surety to the principal, and hold that where certain degrees of relationship exist between the surety and the principal, duress on the principal is duress on the surety also and the surety can defend a suit by the creditor on the ground of the duress.⁴

The standard text authorities are so confusing that they offer little help on the subject, though they cite the different decisions and attempt to deduce an all-embracing rule, which they state in both positive⁵ and negative⁶ terms. In Childs' "Suretyship and Guaranty"⁷ the law is stated as follows: "A surety will not be bound if the principal executed the contract under duress, unless the surety signed with knowledge thereof." According to this statement of the law, to recover against a surety when his principal has been subjected to duress, the creditor must prove that the surety was aware of the duress when he assumed the obligations of surety. In "Ruling Case Law,"⁸ the following statement is made: "It is the rule in a majority of the jurisdictions that duress to a principal will not avoid the obligation of a surety if the latter at the time of executing the obligation knows of the circumstances establishing the duress." From that point of view it would seem that when a surety pleads duress of his principal, the burden of proving his ignorance at the time he became surety rests upon him, that if he cannot prove his ignorance of the fact of duress, the presumption will be in favor of the creditor. No attempt will be made to unravel these difficulties; they are really questions of evidence and are merely referred to for the purpose of showing the confusion which exists. For instance,

¹Cro. Jac. 187 (Eng. 1608).

²Coffelt v. Wise, 62 Ind. 451 (1878); Schuster v. Arena, 83 N. J. L. 79, 84 Atl. 725 (1912).

³Walton v. American Surety Co., 264 Pa. 272, 107 Atl. 725 (1919).

⁴Owens v. Mynatt, 1 Heiskell, 675 (Tenn. 1870).

⁵Spencer on Suretyship, § 57.

⁶Brandt, Suretyship and Guaranty, Third Ed. § 21.

⁷Childs, Suretyship and Guaranty, (1907) § 133.

⁸Ruling Case Law, Vol. 9. Duress, § 18.

while the text authorities seem generally in favor of the view that duress of the principal is no defense for the surety, especially when he had knowledge of the duress, Brandt champions the opposite view and says, "It has also been held, and it seems with better reason, that the duress of the principal alone is a complete defense to the surety."⁹ But he does not advance any arguments in favor of his position, relying solely upon the cases which he cites.

Cases on the question are more numerous than one would suppose, though the total number is not large. The older English cases¹⁰ uphold the view that duress of the principal is no defense for the surety and cases following the English view are found in Massachusetts,¹¹ Illinois,¹² and Maine.¹³ According to these decisions, duress is a defense available only for him on whom the duress is practiced; the duress to which the principal is subjected in no way affects the free judgment of the surety and therefore he should not be allowed to escape liability on that ground. The case of *Springfield Card Manufacturing Co. v. West*¹⁴ is quoted as an authority for this view but the decision really turned on estoppel; the court said the bail was estopped to deny that his principal was liable to arrest.

Cases supporting the opposite view, that duress of the principal is a defense for the surety, are found in Alabama,¹⁵ New York,¹⁶ Tennessee,¹⁷ Indiana¹⁸ and New Jersey.¹⁹ The opinion in *Coffelt v. Wise*,²⁰ expresses the legal reasons for this view: "There are reasons which . . . are conclusive why a surety should not be held upon a contract to which his principal has a valid defence, not of a personal character, but going to the contract itself, as fraud, duress, want or failure of consideration, etc. If the surety is bound by such contract, one of two things must follow. The surety, having been compelled to pay the money due by the contract, must either have his action against his principal to recover the amount paid, or he must lose it. If the first alternative is to be adopted, and the surety may maintain an action against his principal to recover the money paid, then the principal will be compelled virtually to pay upon a contract to which he has a

⁹*Supra*.

¹⁰*Huscombe v. Standing, supra*; *Mantel v. Gibbs*, 1 Brownl. & Golds. 64 (Eng. 1610).

¹¹*Springfield Card Mfg. Co. v. West*, 1 Cush. 388 (Mass. 1848); *Robinson v. Gould*, 11 Cush. 55 (Mass. 1853).

¹²*Plummer v. The People*, 16 Ill. 358 (1855).

¹³*Oak v. Dustin*, 79 Me. 23, 7 Atl. 815 (1887).

¹⁴*Supra*.

¹⁵*State v. Brantley*, 27 Ala. 44 (1855).

¹⁶*Strong v. Grannis*, 26 Barb. 122 (N. Y. 1857).

¹⁷*Owens v. Mynatt, supra*.

¹⁸*Coffelt v. Wise, supra*.

¹⁹*Schuster v. Arena, supra*.

²⁰*Supra*. Quotation from page 458 of the opinion.

complete defence. . . . On the other hand, if the surety, having been compelled to pay the money to the creditor, cannot recover it from his principal, he must lose it, and equal injustice is done."

This case is also important because it offers the first suggestion of a new aspect of this question which has been developed into a rule of law that is generally recognized, at least by the text writers. After the statements quoted above the court goes on to say: "These reasons apply with less force, if at all, to cases of suretyship for persons under disabilities as infants, married women, etc. In such cases the surety may be supposed to have been appraised of the disability of his principal to make a binding contract and to have entered upon the suretyship with reference to that fact." It is to be implied that the court believed a surety usually to be ignorant of the duress practiced upon his principal, whenever that condition does in fact exist. In the case of *Griffith v. Sitgreaves*²¹ this idea of knowledge was made the basis of a new rule which, since the date of that case, has met with the approval of authorities on suretyship. The court says, "I have no doubt of the correctness of the general principle laid down in the older cases that duress, to be a good plea, must be offered to the person who seeks to take advantage of it. . . . In all the cases cited, the duress was either upon the party seeking to avoid the instrument sued upon, or it was known to him."²² Then Mr. Justice Paxson reviews the older cases, and alleges that in all of them the sureties had knowledge of the duress when they became sureties, and lays down the rule that when the surety is ignorant of the duress practiced upon his principal at the time he enters into the contract of suretyship, he can successfully plead the duress and escape liability on that ground. The rule is absolutely without authority, because the cases referred to did not turn on the question of knowledge and none of them mention the fact that the surety had knowledge of the duress practiced on his principal, but it is reasonable and seems to work justice. Childs²³ and Spencer²⁴ state the law in terms of this Pennsylvania rule, though there are few cases which they can cite as supporting it. Of course, the Pennsylvania courts follow it²⁵ and it has been quoted as law in the Circuit Court of the United States.²⁶ It is also the law of Georgia but the result was achieved by legislative enactment.²⁷

A few cases allow the surety to plead the duress practiced on his principal, when there are bonds of blood or marital relation-

²¹90 Pa. 161 (1879).

²²At page 165.

²³*Supra.*

²⁴*Supra.*

²⁵*Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131 (1912); *Walton v. American Surety Co.*, *supra*.

²⁶*Hazard v. Griswold*, 21 Fed. 178 (1884).

²⁷*Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9 (1888).

ship between the surety and the principal of such an intimate degree that whatever affects the principal will also affect the surety. The relationship which the law recognizes under such circumstances ranges from that of father and son²⁸ to mother-in-law and son-in-law.²⁹ But such cases are beyond the problem under discussion, because they really are based on the proposition that when such a bond exists, principal and surety are one in thought and the duress practiced on the principal is also practiced on the surety.

This practically exhausts the authorities, although there are other cases cited in the texts and in the cases. But upon examination it will be found that what they say on the subject is dicta.³⁰ They are used because the material is not so plentiful as the text writers could wish for and hence they are interpreted beyond their real meaning.

E. L. P.

EFFECT OF MISTAKE OF PERSON, MISREPRESENTATION OF PERSON AND IMPERSONATION IN CRIMES, CONTRACTS AND NEGOTIABLE INSTRUMENTS.—An interesting question arises in the law of crimes, contracts, sales, carriers and negotiable instruments, when the courts have had to determine the effect of mistake of person, misrepresentation of person and impersonation. A review of the decisions of the courts on this question reveals the existence of some slight confusion, but the decisions on analogous situations in these branches of the law are not inconsistent in the methods of reasoning used and the conclusions reached.

In the law of crimes when A, who wants to kill B, mistakes X for B and wounds him, the courts have uniformly held A guilty on an indictment for assault and battery with intent to kill X. A wounded X because he believed him to be B whom he wanted to kill. He did not want to kill X, but he did intend to kill the person physically present before him. Since the person wounded was the person physically present before him, it follows that A intended to commit an assault and battery on X with intent to kill him. By this reasoning the intent, to which the courts give effect, is based on the facts of the assault and not on A's belief. Thus the specific intent necessary for the crime was present.¹

The question arises in the law governing the formation of executory contracts in the following type of case: A writes to B, using the name of X and represents himself to be X; B is induced

²⁸Osborn v. Robbins, 36 N. Y. 365 (1867).

²⁹Fountain v. Bigham, *supra*.

³⁰Hawes v. Marchant, 1 Curtis 136 (U. S. Circuit Ct., 1852); Tucker v. The State, 72 Ind. 242 (1880); Putnam v. Schuyler, 4 Hun. 166 (N. Y. 1875); Thompson v. Lockwood, 15 Johns. 256 (N. Y. 1818); Simms v. Barefoot's Exrs., 2 Haywood 606 (N. C. 1806); Thompson v. Buckhannon, 2 J. J. Marshall 416 (Ky. 1829).

¹Regina v. Smith, 33 Eng. Law and Eq. Rep. 567 (1855); People v. Torres, 38 Cal. 141 (1869); McGehee v. State, 62 Miss. 772 (1885).